125

No. 08-960

In The Supreme Court of the United States

BAXTER HEALTHCARE CORPORATION,

Petitioner,

v.

TODD A. WHITE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

CHRISDON F. ROSSI*
GARY A. ROSSI
LAW OFFICES OF
GARY ROSSI, PLLC
42505 Woodward Avenue
Suite 200
Bloomfield Hills, MI 48304-1676
(248) 858-2443

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98006
(206) 616-3167

Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT

At the time of the events giving rise to this action, respondent White was an employee of petitioner Baxter Healthcare Corporation, working in a division that produces and sells medical technologies. White worked as a Teaching Center Specialist, which is a specialized sales representative, selling pharmaceutical products to hospitals that run teaching programs, a position in which he was "held to a higher standard of product knowledge and teaching skills." (Pet. App. 3a).

In the fall of 2004, White applied for promotion to the position of Midwest Regional Manager within his sales division. After interviews were held, Baxter did not choose White for the position. Instead, Baxter awarded the position to a white applicant, Maggie Freed.

In early 2005, White received an adverse performance evaluation for his performance in 2004. As a result of that evaluation, White received a smaller raise in 2005. White also argued that as a result, he was no longer on track for further advancement within the company.

White brought this action under Title VII of the 1964 Civil Rights Act, alleging that both the denial of the promotion and the low performance evaluation were the result of racial discrimination. (Pet. App. 5a-13a).

White offered two types of evidence in support of his promotion discrimination claim. First, he sought to show that he was clearly better qualified than the white applicant who received the promotion. The white worker who was promoted had no experience selling the Baxter proprietary pharmaceutical products involved; whereas, White's experience and knowledge were indisputably extensive. White had an MBA; the white worker who received the promotion had no advanced degree. White had significant prior managerial experience from a job at Johnson & Johnson, Inc. Also, White's success in the field was strongly supported by the testimony of his prior manager, Richard Clark, and evidence of his several awards and accolades included in the record. (Pet. App. 23a).

Second, Baxter officials justified their decision in large measure by asserting that during the interviews for the position, the white applicant performed better than Mr. White. They complained in particular that White was "confrontational" in the interview, citing the fact that White had asked one of the interviewers what had been "done to promote cultural diversity within the company." White argued that a jury could reasonably conclude that this objection reflected racial prejudice or stereotyping. (Pet. App. 7a-8a, 25a; see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989) (plurality opinion) (criticism of female employee as "aggressive" may be evidence of gender based stereotyping)). *Widoe v. Dist. # 111 Otoe County Sch.*, 147 F.3d 726, 730 (8th Cir. 1998).

In support of the downgraded performance review claim that the adverse rating was the result of racial discrimination, White offered evidence that the supervisor who gave him that rating had made a series of biased remarks. The supervisor told White that "nobody wants to be around a black man." That supervisor made a similar comment to another Baxter employee, remarking that "no one wants to work with a black man." In one conversation, the supervisor referred to a female African-American sales representative as "that Black girl." Although the supervisor always called white workers by their first names, he repeatedly addressed respondent as "White, Todd." Finally, the supervisor circulated an e-mail to Baxter workers which showed an image of Osama bin Laden morphing into O.J. Simpson, and which contained the subject line "I KNEW IT!!! I KNEW IT!!! I KNEW IT!!!" (Pet. App. 4a) (emphasis in original e-mail).

White also contended that his adverse rating was the result of an improper failure to use the proper evaluation standard. White asserted that the evaluation should have been based on a standard known as the "2004 PMO Grid." Under the standard specified in the 2004 PMO Grid, White would have been entitled to a rating of "Meets," apparently short for "meets expectations." In response, Baxter argued that White's supervisor used a different standard referred to as the "Gold e-mail" and that as a result of the use of the Gold e-mail formula, White was instead rated as "Meets minus." The "Meets minus" rating resulted

in a lower raise. White also argued that the rating effectively blocked further advancement within the company. (Pet. App. 8a-11a).

Baxter moved for summary judgment arguing the evidence relied on by White was insufficient to support his discrimination claims. The district court held that the evidence offered to support White's promotion claim was too weak to "allow a reasonable jury to opine that the reasons [offered by the employer] were pretextual." (Pet. App. 105a). With regard to White's performance evaluation claim, the district court held that the evidence adduced by White was insufficient even to establish a prima facie case of discrimination. (Pet. App. 112a).

The court of appeals overturned the district court's decision as to both discrimination claims, and remanded the case for trial. (Pet. App. 2a-50a).

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT DECISION DID NOT ESTABLISH AN "ARGUABLY SUPERIOR QUALIFICATIONS" STANDARD

In an employment discrimination case in which the plaintiff alleges that he or she was unlawfully denied a promotion, a plaintiff may support that claim of discrimination "by showing that she was in fact better qualified than the person chosen for the position." *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989); see *Ash v. Tyson Foods, Inc.*, 546

U.S. 454, 456 (2006) ("qualifications evidence may suffice, at least in some circumstances, to show pretext"); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("[t]he fact that a court may think that the employer misjudged the qualifications of the applicants ... may be probative of whether the employer's reasons are pretexts for discrimination"). This case presents an unremarkable application of that rule.

The petition misstates the holding of the court of appeals. Petitioner repeatedly describes the Sixth Circuit as having adopted an "arguably superior qualifications" standard for determining when evidence of comparative qualifications would support a claim of discrimination.[1] Petitioner suggests that under the decision below, any difference in qualifications, no matter how trivial, would suffice, and that the trier of fact could infer discrimination from the mere fact that there was an "arguabl[e]" trivial difference, without ever deciding whether any difference in qualifications actually existed. That asserted Sixth Circuit standard, petitioner contends, differs from the standard in several circuits, the most stringent of which require that the difference in qualifications be so great that the rejection of the plaintiff was unreasonable. (Pet. 14-15).

Under the decision below, however, unreasonableness is indeed the touchstone in evaluating the

---

[1] Pet. 9, 11, 12, 17, 19, 20.

probative value of evidence of comparative qualifications.

> One way in which the plaintiff may raise doubts about the lawfulness of the employer's business decision is by suggesting that the decision itself was *unreasonable*.

(Pet. App. 21a n.6) (emphasis added).

> [T]he plaintiff may ... demonstrate pretext by offering evidence which challenges the *reasonableness* of the employer's decision....

(Pet. App. 20a) (emphasis added).

> If a factfinder can conclude that a *reasonable* employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate – something employers do not usually do, unless some other strong consideration, such as discrimination enters into the picture.

(Pet. App. 22a) (emphasis added) (quoting *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C.Cir. 1998).[2]

---

[2] See Pet. App. 22a ("The reasonableness of the employer's reasons may of course be probative") (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)); 21a-22a n.6 ("the reasonableness of an employer's decision may be considered") (quoting *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 578 (6th Cir. 2003) (en banc)).

That was the standard actually applied by the court of appeals in upholding the sufficiency of the evidence in this case.

> [W]e find that the evidence presented could lead a jury to doubt the reasonableness of Baxter's decision to hire Freed instead of White, and thereby to infer that some other impermissible motivation – such as White's race – guided the employment decision.

(Pet. App. 22a-23a).

Systematically ignoring these repeated articulations of the standard actually utilized by the Sixth Circuit, petitioner insists that the court of appeals required no more than a showing of "arguably superior qualifications," relying exclusively on the following sentence:

> We find that this evidence of White's arguably superior qualifications ... could lead a jury to doubt the justification given for [the] hiring decision.

(Pet. App. 23a). However, it is quite clear that the court below used the adjective "arguably" to avoid seeming to hold that White's qualifications *were* in fact superior. Without that adjective, this sentence (i.e., the phrase "White's superior qualifications") would have a completely different meaning, and would have constituted a finding of fact by the court of appeals that White was the more qualified applicant. The panel properly insisted to the contrary that

> [t]he question of whether the employer's judgment was reasonable or was instead motivated by improper considerations is for the *jury* to consider.

(Pet. App. 21a n.6) (emphasis in original). Clearly, that is why the opinion recites, not that the court of appeals itself found that the selection of Freed was unreasonable, but only that the jury could have done so. (Pet. App. 23a).

The district courts in the Sixth Circuit have not accepted petitioner's strained interpretation of the decision below. In *Berkeley v. Steelcase, Inc.*, 2009 WL 722601 (W.D.Mich. 2009), the district judge rejected such an

> expansive reading of *White*. Contrary to [the plaintiff's] suggestion, *White* does not call for a jury trial simply because the plaintiff has presented evidence that a reasonable employer **could have found** that the plaintiff was more qualified. As evidenced by the following quotation from *White*, a jury trial is called for when there is evidence that a reasonable employer **would have found** that the plaintiff was more qualified:
>
> > If a factfinder can conclude that a reasonable employer **would have found** the plaintiff to be significantly better qualified ... , the factfinder can legitimately infer ... discrimination.

> [*White v. Baxter Healthcare Corp.*, 533 F.3d 381,] 393-94 [(6th Cir. 2008)] (emphasis added) (quoting *Aka v. Washington Hosp. Ctr.* ....)

2009 WL 722601 at *9-*10 (emphasis in original). The decision below has not guaranteed that a plaintiff will always be able to defeat summary judgment with evidence of differences in qualifications, no matter how minor. To the contrary, since the decision in the instant case, summary judgment has repeatedly been granted to the defendants in district court cases in the Sixth Circuit in which the plaintiff relied on such evidence.[3] Moreover, in every district court decision in the Sixth Circuit in which the court cited the decision in the instant case, the court granted summary judgment.[4]

Petitioner notes that the most stringent standard governing use of evidence of comparative qualifications is in several circuits, including the Seventh Circuit, which require that the differences in qualifications "are so favorable to the plaintiff that there

---

[3] *Berkeley*, 2009 WL 722601 at *9-*10 (summary judgment granted); *Physher v. Ohio Dept. of Jobs and Family Services*, 2008 WL 4693734 at *6 (S.D.Ohio 2008) (summary judgment granted); *Wright v. Upper Cumberland Electric Membership Corp.*, 2008 WL 2783519 at *8 (M.D.Tenn. 2008) (summary judgment denied); *Vanallman v. Potter*, 2008 WL 2686629 at *14 (E.D.Tenn. 2008) (summary judgment granted).

[4] *Berkeley*, 2009 WL 722601 at *9; *Corell v. CSX Transp., Inc.*, 2008 WL 4683439 at *12 (E.D.Mich. 2008); *Ahmad v. Kmart*, 2008 WL 4683440 at *7 (E.D.Mich. 2008).

can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." (Pet. 14-15, quoting *Mlynczak v. Bodman*, 442 F.3d 1050, 1059-60 (7th Cir. 2006) (quoting *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002))). However, less than two years before the decision below, the Sixth Circuit itself expressly endorsed that very Seventh Circuit standard, also citing the Seventh Circuit's decision in *Millbrook*.

> [T]he rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former. In negative terms, evidence that a rejected applicant was as qualified or marginally more qualified than the successful candidate is insufficient, in and of itself.... This standard accords with several of our sister courts' standards, *see e.g., Jordan v. City of Gary Ind.*, 396 F.3d 825, 834 (7th Cir. 2005) ("What's more, in order to establish pretext, [the plaintiff] must establish that her credentials were 'so superior to the credentials of the person selected for the job that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the job in question.' ... " (quoting *Millbrook* ...))

Bender v. Hecht's Dept. Stores, 455 F.3d 612, 627 (6th Cir. 2006). The Sixth Circuit standard in *Bender* is virtually identical to the standards in the Second,

Fifth and Eleventh Circuit decisions relied on by petitioner. (Pet. 14-15). The Sixth Circuit applied the *Bender* standard in *Burke-Johnson v. Dept. of Veterans Affairs*, 211 Fed.Appx. 442, 450 (6th Cir. 2006), and again quoted the Seventh Circuit *Millbrook* standard in *Plumb v. Potter*, 212 Fed.Appx. 472, 480 (6th Cir. 2007).

The Sixth Circuit decision in the instant case, although repeatedly referring to whether the difference in qualifications rendered the employer's decision unreasonable, did not itself quote *Bender* or *Millbrook*; neither did the dissenting opinion. But the decision below cannot plausibly be read as repudiating the *Bender* standard, which was binding on the panel below as the law of the circuit. Subsequent to the panel decision in the instant case, district judges in the Sixth Circuit have continued to cite and apply *Bender*. *Wright v. Upper Cumberland Electric Membership Corp.*, 2008 WL 2783519 at *8 (M.D.Tenn. 2008); *Vanallman v. Potter*, 2008 WL 2686629 at *12 (E.D.Tenn. 2008).

The Sixth Circuit standard has over the years proven to be quite stringent. In the vast majority of cases in which this type of evidence has been offered, the Sixth Circuit has held that any differences between the qualifications of a plaintiff and a successful applicant were not great enough to support an inference of discrimination. Indeed, the decision in the instant case is the only occasion since 2004 when any

panel of that circuit has held that comparative qualifications evidence was probative.[5] It may be that the standard in the Sixth Circuit is more demanding than the standard in some other circuits. However, the

---

[5] We have been able to identify seventeen cases, including the instant case, in which the Sixth Circuit considered a claim by a discrimination plaintiff that he or she was better qualified than the successful applicant. In thirteen of these seventeen cases, the Sixth Circuit held the comparative qualifications evidence was insufficient to support a finding of discrimination.

Skelton v. Sara Lee Corp., 249 Fed.Appx. 450, 460-61 (6th Cir. 2007) (evidence insufficient); *Brennan v. Tractor Supply Co.*, 237 Fed.Appx. 9, 21-22 (6th Cir. 2007) (evidence insufficient); *Plumb v. Potter*, 212 Fed.Appx. 472, 480 (6th Cir. 2007) (evidence insufficient); *Burke-Johnson v. Dept. of Veterans Affairs*, 211 Fed.Appx. 442, 450 (6th Cir. 2006) (evidence insufficient); *Bender v. Hecht's Dept. Stores*, 455 F.3d 612, 627 (6th Cir. 2006) (evidence insufficient); *Amini v. Oberlin College*, 440 F.3d 350, 360 (6th Cir. 2006) (evidence insufficient); *Hill v. Forum Health*, 167 F.3d 448, 455 (6th Cir. 2006) (evidence insufficient); *Campbell v. International Paper Co.*, 138 Fed.Appx. 794, 797-98 (6th Cir. 2005) (evidence insufficient); *Jenkins v. Nashville Public Radio*, 106 Fed.Appx. 991, 994 (6th Cir. 2004) (evidence sufficient); *Zambetti v. Cuyahoga Community College*, 314 F.3d 249, 253 (6th Cir. 2002) (evidence sufficient); *Tichenor v. Secretary of the Army*, 1999 WL 35813 at *3 (6th Cir. 1999) (evidence insufficient); *Chandler v. Case Western Reserve University*, 1999 WL 196530 at *3 (6th Cir. 1999) (evidence insufficient); *Anderson v. Premier Industrial Corp.*, 1995 WL 469429 at *5 (6th Cir. 1995) (evidence insufficient); *Kline v. Tennessee Valley Authority*, 1993 WL 288280 at *4-*5 (6th Cir. 1993) (evidence sufficient); *Reeher v. Baker Material Handling Corp.*, 1993 WL 220559 at *9 (6th Cir. 1993) (evidence insufficient); *Townsend v. Federal Aviation Administration*, 1988 WL 23726 at *2-*3 (6th Cir. 1988) (evidence insufficient); *Wrenn v. Wernert*, 1985 WL 13320 at *3 (6th Cir. 1985) (evidence insufficient); *EEOC v. Detroit Edison*, 515 F.3d 301, 313 (6th Cir. 1975) (evidence sufficient).

respondent having prevailed even under the Sixth Circuit standard, a decision by this Court adopting a less stringent standard would not alter the outcome of this case.

II. THE SIXTH CIRCUIT DECISION DID NOT ESTABLISH A "SOME EVIDENCE" STANDARD

Petitioner asserts that the Sixth Circuit has adopted a rule that summary judgment may be defeated whenever there is "some evidence" of discrimination, departing from the proper standard which requires proof of evidence "sufficient" to support an inference of discrimination.

> The Sixth Circuit's requirement that a plaintiff need only produce "some" evidence to overcome summary judgment ... conflicts with a long line of Supreme Court precedent that requires a plaintiff to produce "sufficient" evidence to overcome summary judgment.

(Pet. 29).

The actual opinion of the court of appeals cannot fairly be read to authorize such a departure from the established standard for resolving a summary judgment motion. The standard that the court below actually applied was the traditional test for evaluating summary judgment. Summary judgment, the Sixth Circuit correctly observed, is appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party."

(Pet. App. 13a-14a) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

> The ... issue we must consider with regard to Baxter's summary judgment motion is whether White has presented evidence from which a jury could reasonably infer that White's race was a motivating factor in the issuance of his downgraded 2004 performance evaluation.

(Pet. App. 44a).[6] The court of appeals held that summary judgment was unwarranted because White had met that standard. "We agree with White that a jury could draw such an inference from the evidence presented." (Pet. App. 45a).

> If the jury were to conclude, as it reasonably could based on the evidence presented, that [the responsible supervisor failed to apply] the appropriate standard [in issuing the adverse evaluation], then it could legitimately infer from [the supervisor's] failure to apply this correct standard that an impermissible factor – namely White's race – served as at least a partial motivation.

(Pet. App. 49a).

Petitioner's assertion that the Sixth Circuit failed to inquire whether the evidence was "sufficient" to

---

[6] Pet. App. 38a ("plaintiff can prevail ... by *showing* that the defendant's consideration of a protected characteristic 'was a motivating factor'") (emphasis added).

support a finding of discrimination is belied by the opinion as the Sixth Circuit repeatedly used that very standard.

> The ... question that a court need ask in determining whether the plaintiff is entitled to submit his claim to a jury ... is whether the plaintiff has presented "*sufficient* evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex or national origin was a motivating factor for'" the defendant's adverse action. *Desert Palace* [*v. Costa*], [539 U.S. 90,] 101 [(2003)].

(Pet. App. 38a-39a) (quoting 42 U.S.C. § 2000e-2(m)) (emphasis added). This is the very passage in *Desert Palace* which petitioner suggests the Sixth Circuit ignored. (Pet. 29).

> As Phillips was the Baxter supervisor responsible for evaluating White's 2004 performance, the question becomes whether there is *sufficient* evidence for a jury to conclude that Phillips' decision ... was motivated by the fact that White is an African-American.

(Pet. App. 44a) (emphasis added).

> White has produced *sufficient* evidence to suggest that Phillips harbors a discriminatory animus towards African-Americans.

(Pet. App. 44a) (emphasis added).

> White has produced *sufficient* evidence for a reasonable jury to conclude in his favor on both his single-motive and mixed-motive race discrimination claims.

(Pet. App. 49a) (emphasis added).

Petitioner relies exclusively on a single passage in which the court below stated that "th[e] burden of producing some evidence in support of a mixed-motive claim is not onerous." (Pet. 29; see Pet. App. 36a). The evident purpose of this sentence was not simply by using the adjective "some" to announce the standard as to how much evidence was required, or to disavow the repeated more specific articulations of the applicable legal standard set out elsewhere in the opinion, but only to reject a construction of that standard that would be "onerous." The sentence would have had the same meaning – with none of the implications suggested by petitioner – if the opinion had simply omitted the word "some."

The instant case emphatically is not one in which there was only a mere scintilla of evidence. Petitioner strenuously argues that "a single alleged discriminatory comment" cannot be sufficient to prove that the speaker was biased. (Pet. 31). Certainly, whether an "alleged" biased remark actually occurred would normally be a matter for resolution by the trier of fact. In this case there were several repeated remarks in question, and petitioner does not suggest that a reasonable jury could not have credited the testimony in support thereof. Even if there had been only one

such remark, a reasonable jury could assuredly infer that a supervisor who told a black worker to his face that "nobody wants to be around a black man" harbored the sort of racial animus that might well lead to discriminatory acts. Nothing in the Federal Rules of Evidence, or the decisions of this Court, requires a trier of fact to exonerate a company official because he had made only "a single" bigoted statement to a black worker.

III. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR RESOLVING ANY ISSUE REGARDING THE USE OF *McDONNELL DOUGLAS V. GREEN* IN MIXED-MOTIVE CASES

The court below noted that, at least at a theoretical level, there is some uncertainty among the lower courts about how to utilize in mixed-motive cases the burden shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). While there may be contexts in which those differences are outcome determinative, this is not such a case.

The Sixth Circuit held that there is sufficient evidence in the instant case to support a jury verdict that race was a motivating factor in White's adverse evaluation. Petitioner does not suggest that that fact-bound determination warrants review by this Court. Petitioner does not appear to contend that, in a case

in which a jury had reasonably inferred the existence of an unlawful motivation, *McDonnell Douglas* would nonetheless require that the jury verdict be set aside, and does not claim that any court of appeals has ever construed *McDonnell Douglas* in that paradoxical manner. *McDonnell Douglas* is only "a sensible, orderly way to evaluate the evidence," *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), and does not require that a plaintiff adduce any particular type of evidence. See *id.* ("the method suggested in *McDonnell Douglas* ... was never intended to be rigid, mechanized, or ritualistic"). As respondent itself expressly notes, this Court in *Desert Palace* held that at trial in a mixed-motive case, the plaintiff "need only present sufficient evidence ... that race ... was a motivating factor for an[ ] employment practice." (Pet. 22) (quoting *Desert Palace*, 539 U.S. at 101).

Petitioner's position appears to be that, even if there is sufficient evidence for a reasonable jury to find the existence of discrimination, *McDonnell Douglas* may nonetheless require an award of summary judgment in favor of the defendant. On petitioner's view, there is a category of cases in which the evidence would be sufficient to support a jury verdict, but which *McDonnell Douglas* nonetheless requires be dismissed prior to trial. Petitioner does not, however, assert that any circuit has held that *McDonnell Douglas* somehow mandates summary judgment in a case in which – were the case to proceed to trial – the evidence would be sufficient to support a verdict for the non-moving party.

Petitioner claims that the Fifth, Eighth and Eleventh Circuits would require an award of summary judgment in the circumstances of this case. (Pet. 24-25). The authorities cited by respondent do not support this contention. Petitioner acknowledges that the Fifth Circuit applies a "modified" *McDonnell Douglas* framework in mixed-motive cases, but asserts that "[s]pecifically, the Fifth Circuit requires a plaintiff to establish that ... others outside the protected class who were similarly situated were treated more favorably." (Pet. 24, citing *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339 (5th Cir. 2005)). However, the Fifth Circuit in *Keelan* does not hold that a plaintiff who can establish by a preponderance of the evidence the existence of an unlawful motive must *also* show that there happened to be a "similarly situated" comparator who was treated differently. To the contrary, the court in *Keelan* noted that the Fifth Circuit had no well established rule requiring proof of such a similarly situated comparator.[7]

The prima facie case rule proposed by petitioner would bar claims by – and thus legalize intentional discrimination against – any employees whose circumstances were unique, even where (as here) there

---

[7] 407 F.3d at 340 ("[p]rior case law has not consistently applied Title VII's burden-shifting framework to the question of whether a similarly-situated employee outside the plaintiff's protected class was treated more favorably.") (quoting *Nieto v. L & H Packing Co.*, 108 F.3d 621, 623 n.5 (5th Cir. 1997)).

was sufficient evidence for a reasonable jury to infer the existence of unlawful discrimination.

Petitioner asserts that White's claim "would certainly fail" in the Eighth and Eleventh Circuits "because he lacks 'direct evidence' of discrimination and cannot establish a *prima facie* case." (Pet. 25) (citing *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004) and *Burstein v. Emtel, Inc.*, 137 Fed.Appx. 205, 209 n.8 (11th Cir. 2005). However, nothing in these cases indicates that either the Eighth or Eleventh Circuits defines "direct evidence" or "prima facie case" in a manner that would exclude White's claim. *Burstein* says nothing at all about the standard that a plaintiff would have to meet in the Eleventh Circuit to establish a prima facie case. To the contrary, *Burstein* notes that in that case "[n]o one seriously disputes that Burstein presented a *prima facie* case." 137 Fed.Appx. at 209.

Griffith is similarly silent on the type of evidence needed to establish a prima facie case or to prove intentional discrimination, and the Eighth Circuit in that case adopted a definition of "direct evidence" that is clearly inconsistent with the Sixth Circuit's definition of that phrase. *Compare* Pet. App. 16a n.5 (distinguishing between "direct evidence" and circumstantial evidence) *with* 387 F.3d at 736 ("[d]irect evidence ... is not the converse of circumstantial evidence, as many seem to assume.")

Neither Fifth, Eighth or Eleventh Circuit cases cited by petitioner would require summary judgment

in the instant case. Although there are some semantic differences among the other circuits, even petitioner does not claim that those differences would be outcome determinative in the instant case.

CONCLUSION

For the above reasons, certiorari should be denied.

Respectfully submitted,

CHRISDON F. ROSSI*
GARY A. ROSSI
LAW OFFICES OF GARY ROSSI, PLLC
42505 Woodward Avenue
Suite 200
Bloomfield Hills, MI 48304-1676
(248) 858-2443

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98006
(206) 616-3167

Counsel for Respondent

**Counsel of Record*